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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 44

JOHN V. DOBSON, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 45

E. W. DOBSON, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 46

ESTATE OF JAMES N. COLLINS, DECEASED, FIRST NATIONAL BANK AND TRUST COMPANY OF MINNEAPOLIS, EXECUTOR, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 47

H. J. HARWICK, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 15, 1943.

CERTIORARI GRANTED JUNE 14, 1943.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

DOCKET ENTRIES

Docket No. 105790

H. J. HARWICK, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Leland W. Scott, John W. Windhorst.
For Comm'r: S. U. Hiken, Esq.

1940

Dec. 5—Petition received and filed. Taxpayer notified. (Fee paid).
Dec. 5—Copy of petition served on General Counsel.
Dec. 5—Request for circuit hearing in St. Paul, Minn., filed by taxpayer. 12/5/40 copy served.

1941

Jan. 27—Answer filed by General Counsel.
Jan. 30—Copy of answer served on taxpayer. (St. Paul, Minn.)
Apr. 28—Hearing set 6/16/41 (St. Paul, Minn.).
June 18—Hearing had before Mr. Turner on the merits. Submitted. Stipulation as to the facts filed. Brief due Aug. 2, 1941; Reply briefs Aug. 18, 1941.
July 25—Brief filed by taxpayer.
Aug. 2—Transcript of hearing 6/18/41 filed.
Aug. 2—Brief filed by General Counsel.
Aug. 4—Copy of brief served on General Counsel.

[fol. 2]

1942

Mar. 30—Memorandum opinion rendered, Turner, Div. 8. Decision will be entered under Rule 50. 3/30/42 copy served.

Apr. 17—Agree computation filed.
Apr. 23—Decision entered, Murdock, Div. 3.
July 20—Petition for review by United States Circuit Court of Appeals, Eighth Circuit, with assignments of error filed by taxpayer.
July 22—Proof of service filed.
Aug. 6—Agreed praecipe for transcript filed.

Petition of H. J. Harwick

Docket No. 105790

H. J. Harwick, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Petition of H. J. Harwick

(Received and Filed December 5, 1942)

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated October 21, 1940, and as a basis for the proceeding alleges as follows:

I

The Petitioner, H. J. Harwick, is an individual residing in the City of Rochester, County of Olmsted, State of Minnesota. On or about March 15, 1940, Petitioner filed an income tax return for the calendar year 1939 with the Collector of Internal Revenue of the United States in and for the District of Minnesota.

II

The Notice of Deficiency, a copy of which, marked Exhibit [fol. 3] A, is attached hereto and hereby made a part hereof, was mailed to Petitioner on October 21, 1940. The taxes in controversy are income taxes for the calendar year 1939 asserted against the Petitioner by said notice.

III

Said Notice of Deficiency determined that Petitioner's income tax liability for the calendar year 1939 was $38,272.72.

Of this amount $33,643.71 was paid by Petitioner during the calendar year 1940 and in addition $221.25 was paid on September 12, 1940. Respondent determined a deficiency in Petitioner's income tax liability for the calendar year 1939 in the sum of $4,629.01. The entire amount of said deficiency is in controversy.

IV

The determination of tax set forth in said Notice of Deficiency is based on the following errors:

(a) Respondent erred in determining that the entire amount of $17,000 recovered by Petitioner during the calendar year 1939 from National City Company constituted income taxable to Petitioner.

(b) Respondent erred in determining that $7,115.78 of said $17,000 received by Petitioner from National City Company did not constitute a return of capital to the Petitioner.

(c) Respondent erred in determining that Petitioner realized income in excess of the sum of $9,884.22 as a result of the recovery by Petitioner of said $17,000 from said National City Company.

(d) Respondent erred in determining that the income realized by Petitioner as a result of said recovery from National City Company did not constitute capital gain under the provisions of Section 117 of the Internal Revenue Code.

(e) Respondent erred in determining that there is a deficiency in Petitioner's income tax liability for the calendar year 1939.

V

The facts upon which Petitioner relies as a basis for this proceeding are as follows:

[fol. 4] (a) On or about July 22, 1929, the Petitioner purchased stock of National City Bank of New York from the National City Company for the sum of $38,100. On or about December 15, 1931, the Petitioner sold said stock for the sum of $3,648.72. The Petitioner thereby sustained a loss in the sum of $34,451.28. On or about March 15, 1932, Petitioner filed an income tax return for the calendar year

1931 with the Collector of Internal Revenue of the United States in and for the District of Minnesota. A true and correct copy of said return, marked Exhibit B, is attached hereto and hereby made a part hereof. The income deductions and credits set forth therein are true and correct and respondent has not made any changes therein.

(b) During the calendar year 1939 the Petitioner instituted suit against the National City Company for the recovery of the purchase price of said stock of the National City Bank of New York purchased from said National City Company on July 22, 1929, as set forth in paragraph V (a) above. Said suit was dismissed and Petitioner received as consideration for said dismissal the net amount of $17,000. Except for said recovery of $17,000 during the calendar year 1939 Petitioner has not been reimbursed in any manner for the loss sustained on the sale of said stock of National City Bank of New York realized upon sale thereof on December 15, 1931, as set forth in paragraph V (a) above.

Wherefore, Petitioner prays that this Board may hear the proceeding and decide that:

(a) Respondent erred in determining that the entire amount of $17,000 recovered by Petitioner during the calendar year 1939 from National City Company constituted income taxable to Petitioner.

(b) Respondent erred in determining that $7,115.78 of said $17,000 received by Petitioner from National City Company did not constitute a return of capital to the Petitioner.

(c) Respondent erred in determining that Petitioner realized income in excess of the sum of $9,884.22 as a result of the recovery by Petitioner of said $17,000 from said National City Company.

[fol. 5] (d) Respondent erred in determining that the income realized by Petitioner as a result of said recovery from National City Company did not constitute capital gain under the provisions of Section 117 of the Internal Revenue Code.

(e) Respondent erred in determining that there is a deficiency in Petitioner's income tax liability for the calendar year 1939.

Leland W. Scott, John W. Windhorst, 1300 First National-Soo Line Bldg., Minneapolis, Minnesota. Attorneys for Petitioner.

Duly sworn to by H. J. Hardwick. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

Form 1230 SN-IT-1

Office of Internal Revenue Agent in Charge, St. Paul Division, 800 Post Office Bldg.

Treasury Department, Internal Revenue Service

St. Paul, Minnesota

[fol. 6] Oct. 21, 1940.

Collection District: Minnesota.

Mr. H. J. Harwick, c/o Mayo Clinic, Rochester, Minnesota

SIR:

You are advised that the determination of your income tax liability for the taxable year 1939 discloses a deficiency of $4,629.01 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the internal revenue agent in charge, St. Paul, Minnesota, for the attention of LGE-90D. The signing and filing of this form will

expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by C. W. Rink, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.
LGE/mrr. GPO 2—17679

[fol. 7]

STATEMENT

Mr. H. J. Harwick,

c/o Mayo Clinic,

Rochester, Minnesota

Tax Liability for Taxable Year ended December 31, 1939

	Liability	Assessed	Deficiency
Income tax	$38,272.72	$33,643.71	$4,629.01

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 10, 1940, to your protest dated September 3, 1940, and to statements made at conference held on October 7, 1940.

A copy of this letter and statement has been mailed to Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota, in accordance with the power of attorney executed by you.

Adjustments to Net Income

Net income as disclosed by return		$102,024.36
Unallowable deductions and additional income:		
(a) Trustees fees	$375.00	
(b) Recovery	7,115.78	7,490.78
Net income adjusted		109,515.14

Explanation of Adjustments

(a) This represents the inclusion in income of trustees' fees received from the First National Bank and Trust Company, co-trustee of Mayo Living Trust #2075.

(b) In 1939 you recovered $17,000.00 from the National City Bank in connection with your acquisition and sale of that stock in a prior year. This recovery constitutes gross income 100% taxable within the meaning of section 22(a) of the Internal Revenue Code. Accordingly that portion of the recovery not reported in your return is included herewith as taxable income as shown below:

[fol. 8] Total recovery	$17,000.00
Portion of recovery reported	9,884.22
Adjustment	7,115.78

Computation of Tax

Net income adjusted		$109,515.14
Less: Personal exemption	$2,500.00	
Credit for dependents	33.33	2,533.33
Balance (surtax net income)		106,981.81
Less: Earned income credit (10% of $14,000.00)		1,400.00
Net income subject to normal tax		105,581.81
Normal tax at 4% on $105,581.81		4,223.27
Surtax on $106,981.81		34,049.45
Total tax		38,272.72
Income tax assessed:		
Original, Account No. 200675		33,643.71
Deficiency of income tax		4,629.01

For Exhibit "B"

See Exhibit "B" attached to Stip Facts

United States Board of Tax Appeals

Docket No. 105790

H. J. HARWICK, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ANSWER OF COMMISSSIONER OF INTERNAL REVENUE

(Received and Filed January 27, 1941)

[fol. 9] Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition except it is denied that the entire amount of the deficiency asserted in the deficiency notice is in controversy.

III. Admits that in the notice of deficiency it was determined that petitioner's income tax liability for the calendar year 1939 was $38,272.72; admits that respondent determined a deficiency in petitioner's income tax liability for the calendar year 1939 in the sum of $4,629.01; denies the remaining allegations contained in paragraph III of the petition.

IV. (a) to (e), inclusive. Denies that the respondent erred as alleged in subparagraphs (a) to (e), inclusive, of paragraph IV of the petition.

V. (a) Admits that on or about July 22, 1929, the petitioner purchased stock of National City Bank of New York for the sum of $38,100.00; admits that on or about December 15, 1931, the petitioner sold said stock for the sum of $3,648.72; admits that the petitioner thereby sustained a loss in the sum of $34,451.28; denies the remaining allega-

tions contained in subparagraph (a) of paragraph V of the petition.

V. (b) Denies the allegations contained in subparagraph (b) of paragraph V of the petition, except it is admitted that petitioner received $17,000.00 during 1939.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, respondent prays that the Board redetermine the deficiency herein to be the amount determined by the Commissioner, viz.: $4,629.01 in respect of income taxes for [fol. 10] the taxable year 1939.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: F. R. Shearer, Division Counsel, S. U. Hiken, Special Attorney, Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

Docket No. 105790

H. J. HARWICK, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

John W. Windhorst, Esq., and Leland W. Scott, Esq., for the petitioner.

S. U. Hiken, Esq., for the respondent.

OPINION

Turner: The respondent determined a deficiency in income tax for the year 1939 in the amount of $4,629.01. The question presented is whether a sum of money, or any part thereof, recovered by the petitioner in the taxable year as the result of a claim asserted against the National City Company of New York and arising out of a certain stock transaction in a prior year constitutes a return of capital, as contended by petitioner, or taxable income, as contended by the respondent. The parties have filed a written stipulation of facts with certain exhibits attached thereto and the

Board adopts such stipulation as its findings of fact. We shall recite only the facts deemed necessary to discussion of the issues presented.

Petitioner, a resident of Rochester, Minnesota, filed his 1939 income tax return with the collector of internal revenue for the district of Minnesota.

On July 22, 1929, the petitioner purchased, in a transaction entered into for profit, 100 shares of the capital stock of the National City Bank of New York. The stock also carried certain beneficial interests in the stock of the Na- [fol. 11] tional City Company of New York. The purchase was made in the State of Minnesota from the National City Company, the consideration being $38,000.

On December 15, 1931, petitioner sold the 100 shares of stock and sustained a loss by reason of said sale in the amount of $34,451.28. This loss was claimed as a deduction by the petitioner in his 1931 income tax return and was allowed by the respondent.

Until the early part of 1938 petitioner regarded the aforesaid purchase and sale as a closed and completed transaction. At that time he learned that other individuals who had purchased National City Bank stock in Minnesota from the National City Company had filed legal actions to recover the amounts paid by them for the stock on the ground that it had been sold without having been registered in accordance with the requirements of the Minnesota Blue Sky laws and on the ground that the sales had been fraudulent. After petitioner learned of these facts, and on or about January 10, 1939, he asserted a claim against the National City Company. On March 7, 1939, the claim was settled by a net payment of $17,000 by the company to petitioner, and upon receipt thereof, petitioner executed an instrument releasing the National City Company from all claims, demands, or causes of action which he ever had against it.

In his income tax return for 1939, the petitioner reported income of only $9,884.22 on account of the recovery of the $17,000. In the deficiency notice the respondent adjusted the amount of income reported by adding thereto $7,115.78, thereby treating the entire amount of petitioner's net recovery of $17,000 as gross income, taxable as ordinary gain. If the entire deduction of $34,451.28, claimed and allowed on petitioner's 1931 income tax return, had been disallowed, a deficiency in petitioner's income tax liability for 1931

would have resulted in the amount of $3,349.53, computed as follows:

Net income per return		$12,042.03
Add: Loss on sale of National City Bank stock		34,451.28
Net income revised		46,493.31

[fol. 12]

Less: Dividends	$11,861.81	
Personal exemption	3,500.00	
Credit for dependents	800.00	16,161.81
Balance subject to normal tax		$30,331.50
Normal tax:		
1-½% of first $4,000.00		60.00
3% of next $4,000.00		120.00
5% of $22,331.50		1,116.58
Total normal tax		$1,296.58
Surtax on $46,493.31		2,539.20
Total		$3,835.78
Less: Earned income credit		486.25
Total tax assessable		$3,349.53
Assessed		None
Deficiency		$3,349.53

If the petitioner had received $7,115.78 on the sale of the stock in 1931, in addition to the amount actually received, his deductible loss for 1931 from the sale of the said stock would have been $27,335.50 instead of $34,451.28, and he would have had net income in the amount of $19,157.81. Due to certain credits allowable, however, his income tax for 1931 would have been zero, shown as follows:

Net income shown in original return	$12,042.03
Add:	
Amount recovered in 1939 and not reported as taxable income for 1939	7,115.78
Net income revised	$19,157.81

Less: Dividends	$11,861.81	
Personal exemption	3,500.00	
Credit for dependents	800.00	16,161.81
Balance subject to normal tax		$ 2,996.00

[fol. 13]

Normal tax at 1-½%	44.94
Surtax on $19,157.81	186.30
Tax on net income	$ 231.24
Less earned income credit	231.24
Total tax assessable	00.00
Tax assessed	None
Deficiency	None

Throughout the year 1939 adjustment of petitioner's income tax liability for 1931 was barred by the statute of limitations.

Petitioner contends that the amount recovered in 1939 is in the nature of a capital recovery, and that it constitutes taxable income only to the extent that the loss deduction taken in 1931 resulted in a "tax benefit" to him. Of the total net recovery of $17,000, petitioner admits that to the extent of $9,884.22 he realized a "tax benefit" from the deduction taken in 1931, and concedes that to that extent the recovery constitutes taxable income for 1939. He contends, however, that the remaining $7,115.78 was of no "tax benefit" to him in 1931 and not therefore taxable income in 1939, since that amount could have been added to his gross income for 1931 without resulting in any income tax liability for such year. Petitioner also contends that if any portion of the recovery is taxable to him in 1939 it is taxable as capital gain. The respondent contends that the entire amount recovered in 1939 is taxable as ordinary gain and that it is wholly immaterial whether he realized any "tax benefit" from the deduction taken in 1931, but that in any event he realized a "tax benefit" to the full extent of the recovery, since the full amount of the deduction taken in 1931 did effect an offset of taxable income.

We have considered this same question in the case of Estate of James N. Collins, 46 B. T. A. ——— (March 27,

1942), and in that case we held that since the deduction claimed by the taxpayer in the prior year did not effect an offset of taxable income, the subsequent recovery in the taxable year did not constitute taxable income. In John V. Dobson, 46 B. T. A. —— (March 27, 1942), however, we [fol. 14] held that where recovery was had in a later year in respect of such loss the amount recovered was taxable income in the year of recovery to the extent that the deduction in the prior year of the amount later recovered had effected an offset of taxable income in such prior year. In the instant case the facts show that in 1931 petitioner was allowed a loss deduction of $34,451.28 on account of the sale of the bank stock and after taking such deduction he still had net income of $12,042.03. It appears therefore that the full amount of the deduction claimed in 1931 did effect an offset of taxable income. Accordingly the full amount recovered in 1939 is taxable income for that year. John V. Dobson, supra; National Bank of Commerce of Seattle v. Commissioner, 115 Fed. (2d) 875, affirming 40 B. T. A. 72; Central Loan and Investment Co., 39 B. T. A. 981; and Amsco-Wire Products Corporation, 44 B. T. A. 717.

Petitioner's contention that such income should be taxed as capital gain is denied on authority of Avery R. Schiller, 43 B. T. A. 594.

Decision will be entered under Rule 50.

Entered: March 30, 1942.

(Seal) U. S. Board of Tax Appeals, 1924.

UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 105790

H. J. HARWICK, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ORDER OF REDETERMINATION

Pursuant to the Memorandum Opinion of the Board entered March 30, 1942, the parties herein having on April 17, [fol. 15] 1942, filed an agreed recomputation of tax in accordance therewith, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1939 in the amount of $4,629.01.

Enter: Entered April 23, 1942.

J. E. Murdock, Member.

(Seal) U. S. Board of Tax Appeals, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

B. T. A. Docket No. 105790

H. J. HARWICK, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION OF H. J. HARWICK FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS—Filed July 20, 1042.

To The Honorable Judges of The United States Circuit Court of Appeals for the Eighth Circuit:

Now comes H. J. Harwick, by his attorneys, Leland W. Scott and John W. Windhorst, and respectfully shows:

I

JURISDICTION

The petitioner on review is an individual residing in the City of Rochester, County of Olmsted, State of Minnesota. The respondent on review holds his office under and by virtue of the laws of the United States. An income tax return was filed by the petitioner for the calendar year 1939 on or about March 15, 1940, with the Collector of Internal [fol. 16] Revenue for the District of Minnesota in St. Paul, Minnesota, whose office is located within the judicial district of the United States Circuit Court of Appeals for the Eighth Circuit.

II

NATURE OF CONTROVERSY

On October 21, 1940, the Respondent forwarded to the Petitioner by registered mail a notice of deficiency wherein the Petitioner was notified of a deficiency in the amount of $4,629.01 in his income tax liability for the year 1939.

Thereafter, on December 5, 1940, the Petitioner filed with the Board of Tax Appeals a petition for redetermination of the proposed deficiency for the year 1939. On January 27, 1941, the Commissioner filed with the Board of Tax Appeals his answer to the petition. The proceeding came on to be heard before a division of the Board of Tax Appeals sitting in St. Paul, Minnesota, on June 18, 1941.

The questions presented are (1) whether the Petitioner must include in his taxable gross income for the calendar year 1939 the amount of $7,115.78, representing a portion of the $17,000 received from National City Company in settlement of claim for rescission of a purchase of stock of National City Bank of New York under the Minnesota Blue Sky Law by the Petitioner and excluded by the Petitioner from income reported in his return and (2) whether the amount of said recovery which may be determined to constitute taxable income, including the portion which Petitioner concedes to be taxable, viz., $9,884.22, is taxable as ordinary income or as capital gain under Section 117 of the Internal Revenue Code.

On March 30, 1942, the Board of Tax Appeals promulgated its opinion wherein it was held that the Petitioner was taxable on the entire amount of $17,000 received in settlement of his claim against National City Company in 1939, including the sum of $7,115.78 which was excluded by the Petitioner from the taxable income reported in his return for 1939. The Board further held that said $17,000 was taxable as ordinary income rather than capital gain. On April 23, 1942, the Board entered its decision and [fol. 17] order that there was a deficiency of $4,629.01 in the Petitioner's income tax liability for the calendar year 1939. On or about April 14, 1942, the Petitioner paid the balance then owing of said deficiency, being $4,407.76, plus interest in the amount of $550.97, to the Collector of Internal Revenue for the District of Minnesota.

The facts, shortly stated, are as follows: On July 22, 1929, the Petitioner purchased from National City Company 100 shares of capital stock in the National City Bank of New York at a cost of $38,000. On December 15, 1931, Petitioner sold these shares for $3,648.72, sustaining a loss of $34,451.28, which amount was allowed by the Commissioner as a deduction in determining the Petitioner's income tax liability for that year. In 1938 Petitioner made a claim against the National City Company that he was entitled to

rescind the purchase of stock in 1929 and to recover the purchase price paid therefor. During the year 1939 this claim was compromised by the payment to Petitioner by National City Company of $17,000. Of this amount $7,115.78 was not included in the Petitioner's 1939 income tax return. The balance of $9,884.22 was included in Petitioner's 1939 income tax return as ordinary income and not as capital gain and a tax was paid thereon. If Petitioner's loss realized upon sale of said stock of National City Bank of New York in 1931 had been reduced by the amount of $7,115.78, his net income for 1931 Federal income tax purposes would have been $19,157.81. Due to deductions for personal exemption, credits for dependents, and the earned income credit, his income tax for 1931 on a net income of $19,157.81 would have been zero. The loss on the sale of said stock of National City Bank of New York in 1931 resulted in no tax saving to the Petitioner to the extent of $7,115.78.

III

Points on Which Petitioner Intends to Rely

Petitioner is aggrieved at the decision of the Board of Tax Appeals and says that in the proceeding before the Board and in the opinion and decision aforesaid manifest error occurred and intervened to his prejudice and he assigns as error the following:

[fol. 18] 1. The Board of Tax Appeals erred in determining that there was a deficiency in Petitioner's income tax liability for 1939 and in failing to order a refund to Petitioner for said year in the sum of $2,914.84, in that its decision is contrary to law.

2. The Board of Tax Appeals erred in finding that any part of the amount received in settlement of the legal claim against the National City Company in 1939 in excess of $9,884.22 was [includable] in the Petitioner's taxable income for the calendar year 1939, under Section 22 of the Internal Revenue Code.

3. The Board of Tax Appeals erred in finding that any part of the amount received in settlement of the claim against the National City Company in 1939 was to be treated as ordinary income rather than capital gain under Section 117 of the Internal Revenue Code.

4. The Board of Tax Appeals erred in failing to find that the said amount of $9,884.22 reported by Petitioner as ordinary income in his return for 1938 was taxable as capital gain under Section 117 of the Internal Revenue Code.

5. The Board of Tax Appeals erred in failing to find that none of the amount recovered in settlement of the legal claim against the National City Company in 1939 in excess of $9,884.22 was [includable] in the taxable income of the Petitioner in 1939, under Section 22 of the Internal Revenue Code.

6. The Board of Tax Appeals erred in entering judgment that there was a deficiency of $4,629.01 in the amount of the Petitioner's income tax liability for the calendar year 1939, instead of entering judgment of no deficiency for said year, together with a judgment for a refund to the Petitioner for said year in the sum of $2,914.84, in that the uncontradicted evidence warrants no other conclusion.

Wherefore, The Petitioner requests that the aforesaid decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit; that a transcript of record be prepared in accordance with law and the rules of this Court and transmitted to the Clerk of said Court for filing; and that appropriate [fol. 19] action be taken, to the end that errors complained of may be reviewed and corrected by the Court.

Leland W. Scott, John W. Windhorst, Counsel for Petitioner, 1300 First National-Soo Line Building, Minneapolis, Minnesota.

Duly sworn to by John W. Windhorst, jurat omitted in printing.

* * * * * * *

In United States Circuit Court of Appeals

Notice of filing of Petition for Review and Service.

(Received and Filed July 22, 1942, United States Board of Tax Appeals.)

To: J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

You are hereby notified that H. J. Harwick did, on the 20th day of July, 1942, file with the Clerk of the United

States Board of Tax Appeals, at Washington, D. C., a [fol. 20] petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of July 1942.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

Service of copy of Petition for Review acknowledged this 22nd July 1942.

J. P. Wenchel, Attorney for Respondent.

UNITED STATES BOARD OF TAX APPEALS

Docket No. 105790

H. J. HARWICK, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS—Filed at Hearing June 18, 1941

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, (1) that each of the parties hereto reserves the right to object to the admissibility in evidence of any of such facts, on the ground of irrelevancy and immateriality, and (2) that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent herewith:

1. Petitioner, a resident of Rochester, Minnesota, filed, within the time required by law, his 1939 Federal income tax return with the Collector of Internal Revenue at St. Paul, Minnesota.

2. On July 22. 1929, Petitioner, in a transaction entered [fol. 21] into for profit, purchased in the State of Minnesota from the National City Company (of New York) 100

shares of the capital stock of National City Bank (hereinafter referred to as the stock) for $38,000; the purchase carrying with it, at no additional cost, a proportionate beneficial interest in the capital stock of National City Company (of New York). In June, 1933, the name of National City Company (of New York) was changed to City Company of New York, Inc.

3. On December 15, 1931, Petitioner sold the stock together with said beneficial interest in the capital stock of National City Company (of New York) for $3,648.72, thereby sustaining a loss of $34,451.28. This loss, which the Petitioner claimed as a deduction from gross income in his Federal income tax return for 1931, was allowed as a deduction by the Respondent.

4. From 1931 until the early part of 1938 the Petitioner regarded the aforesaid purchase and sale as a closed and completed transaction. In the early part of 1938, however, he learned that other individuals who had purchased National City Bank stock in Minnesota from the National City Company had filed legal actions to recover the amounts paid by them on the ground that the stock had been sold without having been registered in accordance with the requirements of the Minnesota Blue Sky laws and on the grounds that said sales had been fraudulent. After Petitioner made this discovery, and on or about January 10, 1939, he asserted a claim against the National City Company which was settled on March 7, 1939. The net amount which the petitioner received on such settlement, after paying attorneys fees and other similar expenses, was $17,000.00. A copy of the release which the Petitioner executed on such settlement is attached hereto, marked Exhibit A, and made a part hereof the same as if fully set forth herein.

5. In his Federal income tax return for 1939 the Petitioner reported income of only $9,884.22 on account of the receipt of $17,000.00 as aforesaid. In the deficiency notice from which the appeal herein was taken the Respondent adjusted the amount of income reported by the petitioner on said recovery by adding $7,115.78 thereto, thereby treating the entire amount of petitioner's net recovery of $17,000.00 as gross income, 100% taxable to the petitioner.

[fol. 22] 6. If the entire deduction of $34,451.28 which was claimed and allowed on Petitioner's 1931 Federal income tax return (paragraph 3, hereof, supra) had been disallowed, a deficiency in petitioner's Federal income tax liability for 1931 would have resulted in the amount of $3,349.53, computed as follows:

Net income per return		$12,042.03
Add: Loss on sale of National City Bank stock		34,451.28
Net income revised		$46,493.31
Less: Dividends	$11,861.81	
Personal exemption	3,500.00	
Credit for dependents	800.00	16,161.81
Balance subject to normal tax		$30,331.50
Normal tax:		
1½% of first $4,000.00		60.00
3% of next $4,000.00		120.00
5% of $22,331.50		1,116.58
Total normal tax		$ 1,296.58
Surtax on $46,493.31		2,539.20
Total		$ 3,835.78
Less: earned income credit		486.25
Total tax assessable		$ 3,349.53
Assessed		None
Deficiency		$ 3,349.53

Assessment of this deficiency was barred by statute of limitations throughout the year 1939.

7. If petitioner had received $7,115.78 on the sale of the stock in 1931 in addition to the $3,648.72 which he did receive (paragraph 3, hereof, supra,) his 1931 loss would have been $27,335.50 instead of $34,451.28, and his Federal income tax liability for 1931 would have been zero, computed as follows:

[fol. 23] 1931

Net income shown in original return		$12,042.03
Add:		
Amount recovered in 1939 and not report- as taxable income for 1939		7,115.78
Net income revised		$19,157.81
Less: Dividends	$11,861.81	
Personal exemption	3,500.00	
Credit for dependents	800.00	16,161.81
Balance subject to normal tax		$ 2,996.00
Normal tax at 1½%		44.94
Surtax on $19,157.81		186.30
Tax on net income		$ 231.24
Less earned income credit		231.24
Total tax assessable		00.00
Tax assessed		None
Deficiency		None

8. Photostats of the petitioner's Federal income tax returns for the years 1931 and 1939 are attached hereto, marked Exhibits B and C, respectively, and made a part hereof the same as if fully set forth herein. The income, deductions, and credits set forth in said return for the year 1931 are true and correct and Respondent has made no change therein upon audit of said return.

9. In the deficiency notice from which the appeal herein was taken the respondent disallowed a deduction designated as "trustee's fees," in the amount of $375.00, which the petitioner concedes to be correct.

10. Prior to the issuance of the deficiency notice herein the petitioner made a voluntary payment on account of his income tax liability for 1939 in the amount of $221.25.

This payment, which has not been assessed, is held in the suspense account of the Collector of Internal Revenue for [fol. 24] the District of Minnesota. The deficiency in Petitioner's income tax liability for 1939 which is asserted in the deficiency notice from which the appeal herein was taken is $4,629.01, but in view of said voluntary payment the amount of the deficiency in controversy is $4,401.12.

Leland W. Scott, John W. Windhorst, Counsel for Petitioner. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

EXHIBIT "A" TO STIPULATION

Receipt and Release

For and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, to me in hand paid by The City Company of New York, Incorporated, formerly The National City Company, I hereby release, discharge, and forever acquit said corporation, its subsidiaries and affiliates, and The National City Bank of New York and City Bank Farmers Trust Company, from all claims, demands, or causes of action which I ever had or now have against them, or any of them, arising directly or indirectly from any purchase whatsoever from or any sale whatsoever by The National City Company or The City Company of New York, Incorporated, of stock or rights to subscribe to stock of The National City Bank of New York, or from subscriptions thereto, including any accompanying interest in the stock of The National City Company, The City Company of New York, Incorporated, or City Bank Farmers Trust Company.

In Witness Whereof, I have hereunto set my hand this 7th day of March, 1939.

H. J. Harwick.

In Presence of: —— ——, —— ——.

[fols. 25-26] STATE OF MINNESOTA,
County of Olmsted, ss:

On this 7th day of March, 1939, before me personally appeared H. J. Harwick to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

G. W. Shuster, Notary Public, Olmsted County, Minn. My Commission expires May 3, 1945. (Notarial Seal.)